# STATE PERSONNEL BOARD, STATE OF COLORADO Case No. 2003B017

#### INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

**ELAINE LANPHIER,** 

Complainant,

VS.

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, LABORATORY RADIATION SERVICES,

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on February 4, 2004; January 26, 2005; February 1 and 2, 2005; and March 15, 2005. Assistant Attorney General Melanie Sedlak represented Respondent. Respondent's advisory witness was Anne Margaret Gallegos. Complainant appeared and was represented by Barry Roseman.

## MATTER APPEALED

Complainant, Elaine Lanphier ("Complainant" or "Lanphier") appeals her administrative termination by Respondent, Department of Public Health and Environment, Laboratory Radiation Services, ("Respondent" or "CDPHE"). Complainant has alleged discrimination based on her disability. Complainant seeks reinstatement to a position outside Respondent's Laboratory and Radiation Services ("LARS") Division or front pay and front benefits, prehearing and post-hearing interest on any award of back pay and benefits and attorneys fees and costs. Respondent has requested affirmance of the appointing authority's action and attorneys fees and costs.

For the reasons set forth below, Respondent's action is affirmed.

## PROCEDURAL HISTORY

Complainant's Notice of Appeal was filed on August 13, 2002. After an investigation by CCRD and a finding of probable cause, Complainant reiterated the appeal of her disability discrimination claim to the Board. The matter was commenced on February 4, 2004 and, after various requests for continuance due to unavailability of witnesses, was set for evidentiary hearing on June 29, 2004. On June 28, 2004, Respondent submitted its

Motion for Summary Judgment. After the issue was briefed, the motion was denied on September 30, 2005 and the parties were ordered to submit proposed new hearing dates. The matter was set for a three-day evidentiary hearing beginning on January 26, 2005. At the end of the evidentiary hearing, the parties submitted proposed findings of fact and written closing arguments. The record was closed on May 18, 2005. The record was reopened on June 30, 2005 for the parties' submittal of cases cited in their closing arguments. The record was reclosed on July 29, 2005.

#### <u>ISSUES</u>

- 1. Whether Respondent's termination of Complainant was arbitrary, capricious or contrary to rule or law; and
- 2. Whether attorney fees are warranted.

#### **FINDINGS OF FACT**

#### **General Background**

- 1. The Colorado Department of Public Health and Environment ("CDPHE") hired Complainant as an Administrative Intern in July 1995 in what was then its Radiation Control Division. Over the next few years, CDPHE promoted Complainant, successively, to the positions of Administrative Assistant I; Administrative Assistant II; and, finally, in approximately July 1997, to the position of Administrative Assistant III ("AAIII").
- 2. In late 1996 or early 1997, CDPHE's Radiation Control Division merged with its Laboratory Division and became the LARS Division.
- 3. Robert Quillin was the Director of the LARS Division at the time of that merger. Complainant served as Quillin's assistant during the time that he was the LARS Director until his retirement from that position in February 2000. David Butcher was appointed the new LARS Director in March 2000.
- 4. Complainant began working in the Fiscal Unit of LARS in December 2000, and continued to work in that unit until the termination of her employment. The Fiscal Unit handled the business of the LARS Division, including paying bills, purchasing supplies and making travel arrangements.
- 5. Complainant's work duties as an AAIII in 2001 and early 2002 consisted of taking care of the maintenance of three copying machines in LARS, taking care of telecommunications in the buildings in which LARS employees were housed, processing payment vouchers, ordering goods from vendors, providing clerical support to the people which whom she was working, and compiling reports. Complainant's Position Description Questionnaire listed five essential functions for that position:
  - (a) Providing administrative and clerical support to the Division Director and

staff by coordinating and scheduling meetings, preparing meeting agendas, and recording meeting minutes (30% of her time);

- (b) Drafting, editing and finalizing correspondence, work plans, contracts and reports to provide Division staff with the documents necessary to perform their analytical, regulatory and emergency response functions (20% of her time);
- (c) Designing and updating forms and publications and compiling and formatting the content for the *Radioactive Materials Review* newsletter, and maintaining the index and inventory for Division forms (10% of her time);
- (d) Overseeing office equipment, ordering repairs and maintenance services as necessary, evaluating the need for replacement of office machines and equipment, recommending purchases, and serving as the Division's Telecommunications liaison (15% of her time); and
- (e) Coordinating and arranging travel for all Division staff by obtaining airline ticket price quotes and scheduling flights, reserving hotel accommodations, computing expenses, obtaining COFRS coding for securing airline tickets, preparing necessary forms, and providing quality assurance checks before finalizing arrangements (10% of her time).
- 6. Complainant has also worked at Foley's since September 1998. She worked part-time until October 2003, at which point she began to work full-time.

## Complainant's Mental Health History

- 7. Complainant was first diagnosed as suffering from clinical depression in December 1978. Complainant was suicidal during the first four years of her marriage. As a result of one of her suicide attempts, she was hospitalized at the Nebraska Psychiatric Institute in Omaha.
- 8. Complainant was depressed episodically during most of her marriage. Her condition improved after her divorce was finalized in June 1997.
- 9. During her marriage, Complainant frequently became so depressed that she did not socialize outside her home. On extreme occasions, she withdrew completely from all social contacts and locked herself in her room for days at a time. That occurred twice a month and sometimes even more frequently.
- 10. On several occasions, Complainant became upset and tearful over an interaction with another individual, including looks she received from other individuals.
- 11. For many years, Complainant has had major problems sleeping. Those problems were especially pronounced during times that she was significantly depressed; during those times, Complainant often had to take medications or consume alcohol in order to get to sleep. Those episodes occurred at least three or four times per year during her

marriage, for an average of about one week per episode. Even when she did not have those more major problems, she frequently went to sleep after 10:30 or 11:00 p.m. and was awake before 6:00 a.m.

- 12. During her marriage, Complainant frequently had difficulty cleaning her house or cooking for herself or for her family. She did not have the desire or the energy to do cleaning chores, prepare meals or fold clothing that she had washed. Papers often littered the floor, the floors were not swept, dishes were not washed and the house generally was in a state of disarray. This was despite the fact that she was raised to keep a clean house. Her son, Dennis, frequently ate at his friends' homes because Complainant did not have the interest or desire to cook meals for him or for his brothers.
- 13. Complainant, who was an avid reader in high school, began experiencing difficulty starting or finishing a book while she was in college. Those problems became worse during her marriage. As a result of conflict with her now ex-husband, she feared making decisions for herself or for her family. On many occasions during her marriage, she was not able to think clearly or to make decisions on her own.
- 14. From about 1986 or 1987 until 2000, she did not receive treatment or medication for depression.
- 15. Complainant's condition improved between June 1997, when she obtained her divorce decree, and March 2000. She was working for CDPHE during that time. She felt comfortable making decisions, was much more capable of and much more interested in taking care of regular daily chores, and did not experience severe episodes of withdrawal from all social contacts.
- 16. Complainant experienced a major depressive episode in March 2000. It is not clear exactly what triggered that episode. She was taken by ambulance to Swedish Medical Center at that time, although she was not hospitalized. For several months in 2000 she took the medication Zoloft for her depression.
- 17. When Complainant moved to the Fiscal Unit of LARS in December 2000, her first supervisor was Glenn Kataoka. Complainant had no difficulties working with Kataoka. In July 2001, Andrea Smith became the LARS Fiscal Officer and Complainant's supervisor. Complainant began having problems with Smith as soon as Smith became her supervisor.
- 18. From July 2001 until March 2002, Complainant felt that her co-workers were telling her indirectly that they wanted her to leave. Nobody called her names and nobody told her they wanted her out of there. However, Smith would constantly ignore Complainant and do everything with Complainant's co-worker, Juanita Giles. Complainant felt ostracized. Complainant's co-workers would frequently make snide remarks and did not introduce her to visitors.
- 19. In late 2000 or early 2001, Complainant's cubicle was moved to an area that was a two-minute walk away from the offices and cubicles of the other LARS Fiscal Unit's 2003B017

employees. In November 2001, her cubicle was moved back to the vicinity of the other LARS Fiscal Unit employees because one of the cubicles became available.

20. Throughout 2001 and 2002, Complainant was able to perform her job duties, though it became more difficult during the time period that her cubicle was relocated.

#### March and April 2002

- 21. Prior to March 2002, Complainant did not tell any of her supervisors that she had depression, had been treated for depression or that she had taken Zoloft for her depression.
- 22. On Thursday, March 7, 2002, Elizabeth Williams, Complainant's immediate supervisor, asked Complainant to meet with her in her office. During that meeting, Williams informed Complainant that she had received several complaints about Complainant's behavior. Williams and Smith met again with Complainant later that afternoon and informed Complainant an employee had accused Complainant of intimidation. They also told her that Giles had alleged Complainant had turned around and walked away when she saw Giles and another co-employee standing by a photocopier; Complainant had hung up when a person had called her and asked for Michelle Lavigne; and that, on at least one occasion, Complainant had thrown objects around her desk and had slammed her chair into her cubicle.
- 23. Williams also informed Complainant of a complaint from Brenda Moore, a data entry supervisor, that Complainant, on at least one occasion, had walked down the hallway very quickly in a way that made Moore concerned Complainant would run into another person.
- 24. Williams and Smith informed Complainant that she would be receiving a corrective action because of these issues. Complainant refused to sign the corrective action and became very agitated. She informed Williams and Smith she was leaving and that she would contact her attorney.
- 25. Complainant experienced severe depression and anxiety after her meeting with Williams and Smith on March 7, 2002. She did not return to work at CDPHE the next day, nor did she work at her second job at Foley's that weekend.
- 26. After March 7, 2002, and especially during the first three weeks after that date, Complainant wore pajamas and a bathrobe at home almost all of the time. She did not leave the house, during those first three weeks, except to work at Foley's and to shop for groceries. She slept off and on both during the day and at night, and had to take sleeping pills and drink wine in order to go to sleep. She had little motivation to prepare meals, eat or clean house. She did not want to watch television or to read. She does not have a clear memory of what happened during that time.

- 27. Complainant worked at Foley's after the weekend of March 9 and 10, 2002 because she needed to have some income. In addition, Complainant did not feel anxious while she was working at Foley's, but she did when she worked at CDPHE. She was able to perform her job duties at Foley's. Complainant wrote checks to pay for her mortgage and utilities at some point after March 7, 2002. Her mortgage company did not foreclose on her and her utilities were not shut off during this time period.
- 28. On March 19, 2002 Butcher sent Complainant a letter, addressing her prolonged absence from work and notifying her that if her absence was due to an illness she must, on or before April 4, 2002, submit a medical certification form, completed by her doctor, which would be used to determine if she had a Family and Medical Leave Act ("FMLA") qualifying illness.
- 29. Butcher, in his March 19<sup>th</sup> letter, concluded by stating that if Complainant had a disability which needed to be accommodated then Complainant would need to inform Butcher, in writing, of the type of accommodation "you feel you need" and to substantiate her disability.
- 30. Complainant first saw Dr. Liberty Amador, a family practitioner, on March 28, 2002. Dr. Amador diagnosed Complainant at that time as suffering from severe depression. That diagnosis was based on Complainant's description of her symptoms, her affect and her medical history. Dr. Amador prescribed ten milligrams of Paxil for Complainant's depression on March 28, 2002 and recommended that Complainant consider psychotherapy.
- 31. On March 28, 2002, Dr. Amador also completed a Medical Certification Form in connection with Complainant's request for FMLA leave. On Monday, April 1, 2002, Complainant contacted Dr. Amador and asked her to revise portions of that form. Dr. Amador made some, but not all, of the requested revisions.
- 32. Complainant submitted the revised Medical Certification Form to CDPHE. Dr. Amador stated in that document that Complainant had a "history of depression in past but worsened since 3/01, according to patient"; that Complainant was "under treatment for depression and anxiety that she has had in past"; and that Complainant, "since recent employment problems 4/1/02, [had] worsening symptoms and [was] now on medication."
- 33. On April 2, 2002, Complainant submitted a written grievance to CDPHE concerning the harassment that she claimed that she was experiencing from her coworkers. Complainant stated in that document that she "request[ed] a transfer out of the Laboratory and Radiation Services Division."
- 34. Complainant's grievance does not mention her depression or any other medical condition. The grievance was investigated by CDPHE and the written report, dated May 24, 2002, concluded that the allegations were without merit. Complainant timely appealed the final agency decision to deny her grievance. She alleged discrimination on non-related job factors but did not check the box indicating disability discrimination.
  - 35. Dr. Amador met again with Complainant on Thursday, April 11, 2002. In her 2003B017

written notes, Dr. Amador noted that the Paxil was working, Complainant was feeling better and symptoms of her depression were being controlled. Complainant informed Dr. Amador that she had experienced a panic attack a few days previously. Dr. Amador increased Complainant's dosage of Paxil to 20 milligrams per day and suggested again that Complainant consider psychotherapy. Dr. Amador wrote a note on behalf of Complainant, stating that she recommended Complainant be off work until April 28, 2002, "until medication can take full effect." Complainant provided a copy of that note to CDPHE.

- 36. Beth Amesquita, a CDPHE human resources specialist, had asked Complainant, in a letter dated April 3, 2002, to provide CDPHE, by April 18, 2002, with documentation about the duration of her absence. In response to that letter, on April 16, 2002, Complainant sent to Ann Margaret Gallegos, another CDPHE human resources specialist, a cover letter and a copy of Dr. Amador's April 11, 2002 note. Gallegos received that letter on April 17, 2002.
- 37. Complainant stated in her April 16, 2002 letter that she and her physician had "discussed the effect on my health of going back into a hostile work environment." Complainant further stated that both she and her physician agreed "that it would not be in my best interest to return to a job where I am subjected to harassment by management as well as co-workers." She concluded by stating that she had "requested a transfer out of the Laboratory and Radiation Services and I hope this request will be honored."
- 38. Nancy Brown, the CDPHE Human Resources Director, replied to Complainant's letter on April 18, 2002. Brown stated that neither Gallegos nor she had the authority to transfer Complainant "to another position within the Department or the State." She informed Complainant that this would not preclude her from applying for any position in which Complainant might be interested "by using the customary application process."
- 39. Dr. Amador met again with Complaint on April 25, 2002. Complainant's mood had improved significantly during the prior month, her insomnia and fatigue had been resolved and she exhibited more self-confidence than she had displayed in the past. Dr. Amador concluded at that time that Complainant's depression was stable on her medication and that she was able to perform her work duties for CDPHE.
- 40. Dr. Amador had a long discussion with Complainant about her returning to work at CDPHE. Complainant informed Dr. Amador that she believed she would continue to be harassed and that would make her depression worse. Dr. Amador recommended that Complainant return to work and see how the situation went. If Complainant's depression worsened, Dr. Amador told Complainant she might need to use her FMLA leave until she found another job with the State of Colorado. Dr. Amador would not extend Complainant's medical certification because the medication was working.
- 41. Dr. Amador signed a Fitness-To-Return Certification for Complainant on April 25, 2002. She stated in that document that Complainant was able to work a full, regularly scheduled day with no restrictions beginning on April 28, 2002. She also stated in that document that Complainant's "depression is stable on her current medication"; that Complainant was "instructed to return to work next week"; and that if Complainant's "depression worsens secondary to her work situation, it was recommended that she follow-up and perhaps apply for Family Medical Leave Act." Complainant provided a copy of that 2003B017

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document to CDPHE.

### Complainant's Return to Work

- 42. After Dr. Amador cleared Complainant to return to work, Complainant left voice mail messages for Brown stating that even though she had been cleared to return, the thought of it made her ill and she would not be returning.
- 43. On April 29, 2002, Butcher sent Complainant a letter telling her that if she did not return to work on or before May 6, 2002, she would be deemed to have resigned and her employment terminated.
- 44. Complainant returned to work on Monday, May 6, 2002. She had exhausted all of her sick leave and annual leave with CDPHE and, between April 1 and 28, 2002, was on FMLA leave.
- 45. Upon returning to work, Complainant requested that Williams grant her unpaid leave on Friday, May 10, 2002, and Monday, May 13, 2002, in order to enable her to travel to Spokane for her son's graduation from Gonzaga University.
- 46. Williams did not have the authority to approve Complainant's request for unpaid leave. She referred that request to Butcher. He denied Complainant's request because Complainant had been off work for the prior two months.
- 47. When Butcher denied Complainant's leave request she became upset and left the office. Complainant left a message for Williams stating that she was ill and unable to return to work.
  - 48. Complainant flew to Spokane and attended her son's graduation.

#### **Events Leading Up to Complainant's Termination**

- 49. On May 13, 2002, Williams and Smith mailed Complainant a memorandum giving Complainant a corrective action based upon Complainant's alleged failure to comply with a counseling form issued to her on August 27, 2001 and verbal counseling sessions with Williams about Complainant's interpersonal communication skills, her inappropriate and unprofessional behavior, and her overall performance deficiencies.
- 50. The May 13, 2002 corrective action included a paragraph requesting Complainant inform CDPHE in writing if she had a FMLA-qualifying illness or disability for which she believed a reasonable accommodation was necessary.
- 51. Complainant's depression and anxiety worsened significantly after Butcher denied her request for leave without pay. Dr. Amador spoke with her on May 16, 2002. Complainant informed Dr. Amador that she felt her supervisor was out to harass her and that management at CDPHE was "doing everything to make me quit." She stated that her 2003B017

stress at work had made her depression and anxiety worse and requested that Dr. Amador certify her for FMLA leave. Dr. Amador told Complainant that she needed to see a psychologist because her symptoms had gotten worse, and Complainant stated that she would call to make an appointment with a psychologist.

- 52. Dr. Ruth Stieglitz Hooley, a psychologist, saw Complainant on May 28, 2002. She wrote a letter dated May 28, 2002 stating Complainant was showing symptoms of a mood disorder that should improve with continued medication and cognitive-behavioral therapy. She recommended that Complainant continue her medication; engage in cognitive-behavioral therapy for a minimum of four months; and Complainant's FMLA leave be extended until June 30, 2002. Complainant provided a copy of that letter to Dr. Amador on May 30, 2002.
- 53. Dr. Amador saw Complainant on May 30, 2002 to discuss Dr. Hooley's recommendations. She stated in her chart notes for that date that Complainant was seeing a therapist for depression and anxiety, that Paxil was helping her, and that she continued to have some panic attacks. Dr. Amador increased the dosage of Paxil for Complainant to 40 milligrams per day and instructed her to continue seeing a therapist because Complainant's anxiety had worsened after her attempted return to work. Dr. Amador diagnosed Complainant as suffering from depression and anxiety.
- 54. Dr. Amador relied on Dr. Hooley's written evaluation in making her evaluation and recommendation for Complainant.
- 55. On May 30, 2002, Dr. Amador signed a new FMLA Certification form, which CDPHE received on May 31, 2002. Dr. Amador stated in that document that Complainant was "under treatment for depression," that she was on medications and was seeing a psychologist. She stated that the probable duration of Complainant's condition was her "adult life" and that the probable duration of her absence would be until June 30, 2002. Finally, Dr. Amador stated she would re-evaluate Complainant in one month. Complainant did not show up for her June 27, 2002 appointment with Dr. Amador.
- 56. Complainant saw Dr. Hooley for a second time on June 4, 2002 for psychotherapy. She did not see Dr. Hooley or any other health care provider after June 4, 2002.
- 57. On June 1, 2002, Complainant received notice that CDPHE had denied Complainant's grievance. On June 7, 2002, Complainant's then attorney, Jeffery Menter, filed an appeal from that decision with this Board. Part of the relief requested on the appeal form was "facilitation of transfer."
- 58. In the attachment to her grievance appeal, Complainant makes allegations of harassing behavior by co-workers who are excluding or ostracizing Complainant. Complainant checked the box for non-job related discrimination. She did not check the box for disability discrimination. Neither the June 7, 2002 appeal nor its attachment make any reference to Complainant suffering from disability discrimination, that Complainant suffers from a disability or that she suffered from depression.

59. On Friday, June 28, 2002, Complainant faxed a letter, dated June 27, 2002, to Brown. That letter bears a "received" stamp of CDPHE Personnel, dated July 5, 2002. Complainant stated in that letter:

I am unable to return to my present position because of anxiety and depression and I am requesting reassignment to another department and supervisor to facilitate my disability in accordance with the Americans With Disabilities Act.

#### **Termination of Employment**

- 60. Butcher, in a letter dated July 3, 2002, informed Complainant that, pursuant to State Personnel Board Rule 6-10, he had scheduled a meeting with Complainant on July 15, 2002, concerning possible disciplinary action against Complainant for her alleged unauthorized use of leave, failure to report to work on July 1, 2002, failure to communicate with her supervisor and other issues that might arise as a result of that meeting. Complainant sent the letter to her attorney, Jeffrey Menter.
- 61. Brown responded to Complainant's letter of June 27, 2002 in a letter dated July 7, 2002. Brown told Complainant to provide her by July 19, 2002 with "a written request for accommodation substantiating your illness and/or disability that requires this type of accommodation" and to "identify how a reassignment will accommodate your disability." She enclosed a copy of the Department's policy on accommodations for persons with disabilities along with forms that she requested that Complainant's physician complete.
- 62. CDPHE's policy on accommodations for persons with disabilities, in effect on July 2002, required an employee requesting an accommodation to have his or her physician complete its Letter to the Provider and its Functional Abilities Information forms, or to provide other certifiable proof, "substantiating the disability and the limitations and/or restrictions he or she may have." The Functional Abilities Information form focused on information concerning physical disabilities rather than mental disabilities. However, it specifically asked "[w]hat types of situations should the employee avoid in the workplace or [sic] setting?" The April and June 2002 FMLA medical certifications provided by Complainant prior to this had not addressed this issue.
- 63. On July 10, 2002, Complainant sent a letter to Brown, asking that all future correspondence be sent to her attorney, Jeffrey Menter.
- 64. On July 19, 2002, Butcher sent Complainant a letter, in care of her attorney, Menter, providing four dates in August 2002 for an R-6-10 meeting to discuss Complainant's exhaustion of leave and possible disciplinary action for her alleged unauthorized use of leave, failure to report to work on July 1, 2002, failure to communicate with her supervisor and other issues that might arise as a result of that meeting.
- 65. In the July 19<sup>th</sup> letter, Butcher stated the he must be notified by no later than July 29, 2002 on which of the four dates Complainant would be available to meet.

- 66. Neither Complainant nor Menter responded to either Brown's July 7<sup>th</sup> letter regarding Complainant's request for a transfer or to Butcher's July 19<sup>th</sup> letter regarding potential R-6-10 meeting dates.
- 67. On July 30, 2002, Butcher mailed a letter to Menter, stating that he had decided to administratively terminate Complainant's employment for exhaustion of leave. Among other things, he stated in that letter that Complainant was "not a qualified individual with a disability who can be reasonably accommodated without undue hardship."

#### **Vacant Positions**

- 68. CDPHE advertised three employment opportunities for AAIII and AAI positions between March 7 and July 31, 2002. Those positions were:
- (a) Position Number 1163, a full-time AAI position in CDPHE's Water Quality Control Division. CDPHE posted the announcement for that position on May 7, 2002. It selected Laralee Evans for that position on or about September 1, 2003. Ms. Evans' application stated that the job was announced as an AAII position at the time that she applied for it. Ms. Evans was employed by CDPHE as an AAI at the time that she applied for and was accepted for promotion into that position.
- (b) Position Number 261, a part-time AAIII position in the Executive Director's office of CDPHE. CDPHE posted the announcement for that position on May 13, 2002. It selected Donald Lim for that position on or about August 5, 2002. Mr. Lim was not employed by CDPHE at the time that he applied for and was hired into that position.
- (c) Position Number 2476, a full-time AAIII position in CDPHE's Health Promotion and Disease Prevention Division. CDPHE posted the announcement for that position on June 14, 2002. It selected Denise Ellen DeSandre for that position on or about August 5, 2002. Ms. DeSandre was employed by CDPHE as an AAII at the time that she applied for and was accepted for promotion into that position.
- 69. Complainant was qualified by virtue of her experience, knowledge, skills and abilities for each of those three positions.
- 70. CDPHE did not notify Complainant that any of these positions was vacant. CDPHE did not consider placing Complainant into any of those three positions, even after Complainant stated explicitly that she was requesting a reassignment to a new position under the Americans with Disabilities Act as an accommodation to her disability.

#### **DISCUSSION**

## I. **GENERAL**

Complainant argues that Respondent's administrative termination of her employment violates the Colorado Anti-Discrimination Act, §24-34-401, et seq., C.R.S. ("CADA"). In alleging discrimination, Complainant bears the burden of proving by preponderant evidence that Respondent has discriminated against her. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if Respondent's action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

Complainant has alleged that Respondent has violated the CADA by discriminating against her on the basis of her disability, a mental impairment – clinical depression. In order to establish disability discrimination, Complainant must show 1) she is a disabled person; 2) she was otherwise qualified for her current position; 3) she was terminated from her position because of her disability; 4) she requested reasonable accommodation either within her current position or through transfer to a vacant position for which she was qualified; and 5) despite her request for reasonable accommodation by transfer to a vacant position, the employer continued to seek applicants for the vacant position or hired persons who possessed the employee's qualifications. *Community Hospital v. Fail*, 969 P.2d 667 (Colo. 1998). Once this *prima facie* showing has been made, the burden shifts to the employer to establish that the requested accommodation was an undue hardship or it made an offer of accommodation. *Id.* At all times, the employee bears the ultimate burden of persuasion the she has been discriminated against. *Id.* 

The Colorado Civil Rights Commission ("CCRC"), which has rulemaking authority under the CADA, has promulgated a rule that states that the CADA "is substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act [42 USC §1211, the "ADA"]." CCRC Rule 60.1(A), 3 CCR 708-1. Therefore, federal case law interpreting the ADA is persuasive authority.

## a. Complainant is a disabled person within the meaning of the ADA.

Under the CADA, an employer may not discriminate against an employee because of an employee's disability, including a mental impairment, which substantially limits one or more major life activities. §§24-34-301(2.5)(b)(II) and 24-34-402(1)(a), C.R.S. The EEOC has promulgated rules to implement the ADA which state that "substantially limits" means either 1) an inability to perform a major life activity that the average person in the general population can perform; or 2) significant restriction as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. §1630(j)(1). Factors to be considered include the nature and severity of the impairment, its duration or expected duration, and the actual or expected permanent or long-term impact. 29 C.F.R. §1630.2(j)(2).

The major life activities in which Complainant alleges she has been substantially limited include sleeping; caring for herself, including keeping house and cooking; eating and drinking; cognitive functions and concentrating; and interacting with others. Almost all of these have been held to be major life activities. *Pack v. K-Mart Corp.*, 166 F.3d 1300, 1305 (10<sup>th</sup> Cir. 1999) (sleeping); CCRC Rule 60.1(D)(1)(c), 3 CCR 708-1 (caring for oneself); *Peters v. Baldwin Union Free Sch. Dist.*, 320 F.3d 164, 168 (2d Cir. 2003) (keeping house); *Schwertfager v. City of Boynton Beach*, 42 F.Supp.2d 1347, 1359 (S.D. Fla. 1999) (cooking); *Waldrip v. General Electric Co.*, 325 F.3d 652 (5<sup>th</sup> Cir. 2002) (eating); *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1027 (8<sup>th</sup> Cir. 1999) (drinking); *Brown v. Cox*, 286 F.3d 1040, 1045 (8<sup>th</sup> Cir. 2002) (cognitive functions); and *McAlindin v. County of San Diego*, 192 F.3d 1226 (9<sup>th</sup> Cir. 1999) (interacting with others).

Even if keeping house, cooking or concentrating are not major life activities, they may be significant components of a major life activity and, therefore, should be examined. See *Peters*, 320 F.3d at 168 and *Pack*, 166 F.3d at 1305. Given the long duration of Complainant's medical history of suffering from depression, prior to March 2002 and after March 2002, and the severity of her condition, she has met her burden of establishing that she is a disabled person within the meaning of the CADA and the ADA.

## b. Complainant was otherwise qualified for her position.

There was no credible evidence presented that Complainant was not qualified for her AAIII position. The corrective action issued by Williams and Smith which Complainant appealed to the Board in June 2002, addressed her behavior, not her performance. In addition, given CDPHE's promotion of Complainant through the Administrative Assistant series, she also was qualified for the vacant AAI and AAIII positions.

#### c. Complainant was terminated from her position because of her disability.

Butcher informed Complainant twice that he was contemplating disciplining her because she was not at work. The credible evidence established that even though Complainant was being treated for depression, including receiving medication, she was unable to report for work at LARS because she was suffering from depression. On the other hand, other than one weekend in March 2002, Complainant has been able to continuously work at Foley's and has even moved from working part-time to full-time without triggering a major depression episode. Ultimately, Butcher terminated Complainant because she had not reported back to work after exhausting her leave while being treated for depression. Therefore, Complainant was terminated because of her disability.

## d. Complainant did not request reasonable accommodation as she did not engage in the interactive process.

Under both the CADA and the ADA a "reasonable accommodation" may include a reassignment from an employee's current job to one that she desires and for which she is qualified. *Community Hospital*, 969 P.2d at 676; 42 U.S.C. §1211(9); *Smith v. Midland* 2003B017

Brake, 180 F.3d 1154, 1161 (10<sup>th</sup> Cir. 1999).

Implementation of the reasonable accommodation aspect of the CADA and the ADA is accomplished through the interactive process. This process requires the participation of both parties and is triggered by an employee requesting a reasonable accommodation. This request must provide an employer with 1) notice of the disability; 2) any resulting limitations; and 3) a request to reasonably accommodate the employee's disability – in this case a transfer of Complainant to an existing vacancy. *Smith*, 180 F. 3d at 1171.

One of the outcomes of this interactive process should be the determination of the precise limitations of Complainant's disability and potential reasonable accommodations that could overcome her limitations. *Templeton v. Neodata Services, Inc.*, 162 F.3d 617, 619 (10<sup>th</sup> Cir. 1998). If an employee fails to provide meaningful medical information which clarifies the extent of her medical restrictions necessary to the interactive process, then the employee is precluded from claiming her employer has failed to provide reasonable accommodation. *Templeton*, 162 F.3d at 619.

In this action, Complainant argues she made four requests for a transfer:

- 1) her April 2, 2002 grievance;
- 2) her April 16, 2002 letter to Gallegos;
- 3) Complainant's June 7, 2002 appeal to the Board of the final agency decision on her April 2, 2002 grievance; and
- 4) the attachment to Complainant's June 7, 2002 grievance appeal to the Board.

The only time that Complainant communicates to Respondent and possibly makes a connection between her disability and her transfer request is in her April 16, 2002 letter to Gallegos. In that letter she connects her health to the condition of her work environment and requests a transfer. But she does not mention her depression or that she suffers from a disability. She simply states that she is subjected to harassment and that it is a hostile work environment. Even if Respondent had connected Complainant's request for a transfer with her depression, that connection would have been made hazy by the fact that, within two weeks of submitting this letter to Respondent, Complainant is cleared to return to work full-time with no restrictions. In light of this clearance to return to work, it was reasonable for Respondent not to understand Complainant's request was based on the fact that her current work situation triggered her depression.

Complainant's April 2002 grievance also makes no mention of her disability – it simply discusses the harassing behavior of her unfriendly co-workers and asks, in that context, that she be transferred. Finally, both Complainant's appeal to the Board in June 2002 of that grievance decision and the attachment to that appeal make <u>no</u> mention of Complainant's disability or that she was being subjected to disability discrimination.

Complainant's April and May FMLA medical certifications and her April Fitness to Return to Work addressed why she was out on FMLA leave – she was suffering from 2003B017

depression and was receiving treatment for her depression. They did not state that her depression, triggered by her work environment, needed to be accommodated through a transfer or that a transfer was the only reasonable accommodation.

From mid-April 2002 until the end of June 2002, there is only one communication between the parties with regards to Complainant's disability and her request to transfer – the May 13<sup>th</sup> corrective action. That document tells Complainant that she must inform CDPHE in writing if she has a disability for which she believes reasonable accommodation is necessary. During this two and a half month time period, Complainant had returned to work and then been certified by Dr. Amador for further FMLA leave for the month of June while being treated for depression. Therefore, Respondent was aware that Complainant was absent from work in June 2002 because she was being treated for depression. However, CDPHE had still not received any information from a medical provider substantiating that her work environment exacerbated Complainant's disability.

When Complainant, at the end of June 2002 and prior to the expiration of her FMLA leave, asked for an accommodation for her disability. Respondent asked for further information. In particular, on July 7<sup>th</sup>, Brown asked Complainant to explain specifically why reassignment would accommodate her disability. Prior to this, Complainant had provided two medical certification forms that explained she suffered from and was being treated for depression. However, no evidence was presented at hearing that, up to that date, either Complainant or her former attorney had provided specific information as to why reassignment was needed to accommodate Complainant's disability. While Respondent was aware of Complainant's disability, it could reasonably ask Complainant for further information, substantiation by a medical provider regarding Complainant's disability and how it could be accommodated. Up to that point Respondent had only Complainant's request for a transfer, her FMLA medical certifications and her Fitness to Return to Work. While Complainant had determined what was the reasonable accommodation for her disability, there was no meaningful medical information to substantiate that accommodation. Understandably, Respondent needed substantiation so that it could participate fully in the required interactive process and have input into whether this was the only reasonable accommodation for Complainant's disability.

As stated above, the interactive process is meant to be an exchange of information, the proverbial two-way street of communication. One party may not unilaterally make a determination as to the existence of a disability and the basis for a particular request for accommodation without, under *Templeton*, providing the other party with specific information. While Complainant was suffering from depression, that does not mean she or her former attorney could refuse to interact and communicate with Respondent. At no time did Complainant explain to Respondent that her work environment was triggering or exacerbating her depression. She had, at a minimum, four opportunities to do so after being diagnosed by Dr. Amador. Those four occasions were 1) when she filed her April 2002 grievance; 2) when she was asked in the May 13<sup>th</sup> corrective action if she had a disability that needed a reasonable accommodation; 3) when she appealed Respondent's decision on that grievance; and, 4) when she was asked, in Brown's July 7<sup>th</sup> letter, to

explain her request. Complainant did not, avail herself of any of those opportunities.

While in retrospect, the connection might be made, it is because of the benefit of hearing from Complainant and her witnesses. It is important to recall that a critical portion of this information was not disclosed to Respondent. Therefore, it is reasonable for Respondent, based upon the lack of information it had, not to understand, exactly, the type of reasonable accommodation needed to be made for Complainant's disability. It was reasonable for Respondent to have believed that Complainant was suffering from depression and that was affecting her work behavior, rather than believing that her work environment, where she had operated for a number of years without mishap, was now triggering her depression.

Given her failure to engage in the interactive process, Complainant has not met her burden of establishing that she requested a reasonable accommodation.

#### D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801.

Given the above findings of fact, an award of attorney fees to Respondent is not warranted. Complainant presented rational arguments and competent evidence to support her claims. In addition, there was no evidence which would lead to the conclusion that Complainant pursued her constitutional right to a hearing in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth.

#### **CONCLUSIONS OF LAW**

- 1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
- 2. Attorney's fees are not warranted.

## **ORDER**

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 1<sup>st</sup> day of August, 2005.

Kristin F. Rozansky Administrative Law Judge 633 – 17<sup>th</sup> Street, Suite 1320 Denver, CO 80202-3604 303-866-3300

#### **NOTICE OF APPEAL RIGHTS**

#### EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

#### PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

#### **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

#### **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 □ inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

#### **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

## **CERTIFICATE OF SERVICE**

foregoing INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE APPEAL RIGHTS in the United States mail, postage prepaid, addressed as follows:	
Barry D. Roseman Roseman & Kazmierski, LLC 1120 Lincoln Street, Suite 1607 Denver, Colorado 80203	
and in the interagency mail, to:	
Stacy L. Worthington First Assistant Attorney General Employment Law Section 1525 Sherman Street, 5 <sup>th</sup> Floor Denver, Colorado 80203	
Jane F. Sprague	